

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In the Matter of )  
 )  
Implementation of Section 309(j) )  
of the Communications Act )  
Competitive Bidding )  
 )

PP Docket No. 93-253

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**PETITION FOR CLARIFICATION OR RECONSIDERATION  
OF COMMNET CELLULAR, INC.**

CommNet Cellular, Inc., pursuant to Section 1.429 of the Commission's rules, hereby petitions for clarification or reconsideration of the Commission's Fifth Memorandum Opinion and Order in the above-captioned proceeding.<sup>1/</sup>

**I. INTRODUCTION**

Founded in 1983, CommNet Cellular Inc. ("CommNet") is one of America's leading rural cellular telephone companies, with operations in eight western plains and mountain states.<sup>2/</sup> As one of the pre-eminent providers of wireless communications services to rural America, CommNet now wishes to bring its strengths and wireless expertise to bear as a participant in the Commission's upcoming auctions for "entrepreneur's block" licenses to

<sup>1/</sup> In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Memorandum Opinion and Order (released November 23, 1994) ("Fifth Memorandum Opinion"). Public notice of the Fifth Memorandum Opinion appeared in the Federal Register on December 7, 1994.

<sup>2/</sup> Specifically, CommNet owns and manages interests in seven Metropolitan Statistical Areas ("MSAs") and forty-eight Rural Service Areas ("RSAs") serving more than 600 distinct rural communities in Colorado, Idaho, Iowa, Montana, North Dakota, South Dakota, Utah and Wyoming. When CommNet's buildout is completed in 1995, its network will provide service to more than 16,000 miles of interstate and state highway. As of December 31, 1994, CommNet had more than 12,000 miles of highway coverage, and 255 cell sites in commercial service in its network.

provide broadband Personal Communications Services ("PCS").<sup>3/</sup> Given CommNet's track record in providing wireless services to rural markets, CommNet is well positioned to help realize Congress's statutory objective, set forth in Section 309(j) of the Communications Act, of ensuring that new and innovative technologies such as PCS are "readily accessible to the American people," and in particular, that the goal of "prompt delivery of service to rural areas" is achieved.<sup>4/</sup>

With gross revenues of approximately \$15 million and \$33.5 million for FY 1992 and FY 1993, respectively, and present total assets of approximately \$275.5 million, CommNet falls well within the Commission's entrepreneur's block financial eligibility caps,<sup>5/</sup> and indeed, may qualify to bid as a "small business" in the rapidly approaching C-block auctions.<sup>6/</sup> Nevertheless, merely because CommNet's stock is publicly traded,<sup>7/</sup> CommNet continues to face a technical conundrum under the Commission's rules which may

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<sup>3/</sup> In its Fifth Report and Order (which was modified in several respects by the Fifth Memorandum Opinion), the Commission designated a portion of the broadband PCS spectrum available at auction for qualified entrepreneurs. Eligible entrepreneurs are permitted to bid on Basic Trading Area ("BTA") licenses on the C (30 MHz) and F (10 MHz) blocks. In addition, entrepreneurs who fall within one of the four statutory "designated entity" categories (small businesses, rural telephone companies and businesses owned by members of minority groups and/or women) are eligible for additional benefits to enable them to acquire broadband PCS licenses. See In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order (released July 15, 1994) ("Fifth Report and Order"), at ¶¶ 118-129.

<sup>4/</sup> See Section 309(j)(4)(B)(C).

<sup>5/</sup> In order to establish eligibility to bid on the entrepreneur's blocks, entities must demonstrate that, together with their affiliates and certain investors, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. See 47 C.F.R. § 24.709; Fifth Report and Order at ¶ 121.

<sup>6/</sup> A "small business" under the Commission's rules is an entity which, along with affiliates and attributable investors, has average annual gross revenues of not more than \$40 million for the preceding three years. See 47 U.S.C. § 24.720(1).

<sup>7/</sup> Commnet's stock is traded on the Nasdaq National Market under the symbol CELS.

unfairly and needlessly restrict the ability of CommNet and similarly situated publicly-traded entrepreneurs from raising the significant capital necessary to participate in the broadband PCS auctions. Thus, for the reasons set forth below, CommNet urges the Commission to clarify or revise its rules in a manner that will ensure and maximize the market participation of all qualified entrepreneurs in the PCS auctions, including those that happen to be publicly traded.

## II. DISCUSSION

When the Commission adopted its "entrepreneur's block" auction framework for the C- and F-block licenses, its methodology for assessing an applicant's compliance with the relevant entrepreneur and small business financial caps was (and remains) based on a distinction between: (a) non-controlling investors (whose financial status would not be attributed to the applicant); and (b) investors holding interests in a designated "control group" of the applicant, defined as an entity or a group of individuals possessing de jure and de facto control of an applicant or licensee.<sup>8/</sup> Specifically, the Commission's rules would ensure such compliance by looking to the gross revenues and assets of attributable investors and all control group members, regardless of the size of their individual interests.<sup>9/</sup> The primary structure that the Commission adopted allows non-controlling investors to own up to 75 percent of the applicant's total equity, so long as (1) no investor holds more than 25 % of

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<sup>8/</sup> Fifth Memorandum Opinion at ¶ 58; Fifth Report and Order at ¶¶ 158-59; 47 C.F.R. § 24.720(k).

<sup>9/</sup> The Commission reasoned that the control group requirement would ensure that designated entity and entrepreneur principals would retain control of the applicant and own a substantial financial interest in the venture, while at the same time enabling non-controlling investors outside the control group to provide essential capital to an applicant without their revenues or assets being attributed to the applicant. See Fifth Memorandum Opinion at ¶ 58.

the applicant's passive equity; and (2) in the case of a corporate applicant, at least 50.1% of the voting stock is held by the control group.<sup>10/</sup>

On reconsideration, the Commission refined its "control group" concept in several respects. Most significantly for purposes of this petition, the Commission correctly acknowledged that the generally sound "control group" requirement it had implemented to ensure compliance with the entrepreneur's block eligibility criteria was uniquely unworkable when applied to small publicly-traded corporations like CommNet that possess widely dispersed stock ownership. With respect to such companies, identification of the "control group" and discrete "qualified investors" as required by the Commission's rules was not only difficult but nonsensical, and threatened to hinder significantly or preclude entirely these entities from participating in the entrepreneur's block auctions.<sup>11/</sup>

Consequently, observing that it was "not the Commission's intent that these companies be denied the opportunity to bid on the entrepreneur's block, or to qualify for treatment as a small business," the Commission adopted a control group exemption for small, publicly traded corporations with widely dispersed stock ownership that it believed would alleviate the problem. Under this exemption, so long as a small, publicly traded corporation is found to have dispersed ownership of voting stock and no controlling affiliates,<sup>12/</sup> the Commission has stated that the corporation "will not be required to aggregate with its own

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<sup>10/</sup> Id. at ¶ 59. The Commission also adopted a special option for women- and/or minority-owned applicants, which would permit a single investor in such an applicant to own up to 49.9% of the passive equity. Id.; see 47 U.S.C. §§ 24.709 (3), (4).

<sup>11/</sup> See Fifth Memorandum Opinion at ¶¶ 72-74.

<sup>12/</sup> Specifically, no "group" as defined in the Securities and Exchange Act of 1934 may have the power to control the election of more than 15% of the corporation's directors and no person as defined in the Act may have an equity interest of more than 15%. See 47 C.F.R. § 24.720(m). CommNet meets this definition.

revenues and assets the revenues and assets of management and shareholders for purposes of entrepreneur's block eligibility or small business status."<sup>13/</sup>

Unfortunately, the Commission also seemed to circumscribe the exemption in the following manner:

Small publicly traded corporations that choose to exempt themselves from the control group requirement must own all the equity and voting stock of the applicant or licensee. We find that their ability to rely on the corporation's existing capital structure to induce new passive investment on an ongoing basis provides a level of flexibility that is comparable to applicants/licensees with an identifiable control group.<sup>14/</sup>

The upshot of the above appears that although the Commission's public company exemption was intended to afford small publicly traded corporations like CommNet the ability to enter and participate fully in the entrepreneur's block auctions, the Commission's rules nevertheless may effectively preclude these entities from employing the fundamental corporate structure that the Commission has made available to all other entrepreneur's block applicants, *i.e.*, the so-called "25 Percent Equity" structure set forth in Section 24.709(3) of the Commission's rules. If this is the case, the odd consequences of the current rule are (1) that while CommNet and other small publicly traded entrepreneurs with widely dispersed voting stock are nominally permitted to enter the C-block auctions directly as PCS applicants, they cannot serve at the "control group" level of the PCS applicant and are thereby effectively precluded from raising equity capital through the pursuit of joint ventures with non-controlling strategic investors; and (2) CommNet and other similarly situated entities instead are left to induce investment by diluting their own "existing capital

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<sup>13/</sup> Fifth Memorandum Opinion at ¶ 74.

<sup>14/</sup> Id. at ¶ 75.

structures." In CommNet's view, such results makes little sense as a matter of logic or policy.

First, like all other applicants who meet the entrepreneur's block eligibility criteria -- applicants that by definition are not gigantic companies with access to unlimited capital resources -- CommNet must raise capital to participate in the PCS auctions. In this regard, the Commission's assumption that a small publicly traded company's demonstrated ability in the past to obtain funding through capital markets necessarily translates to a concomitant ability to do so today for the purposes of entering the PCS auction is simply wrong.

As an entrepreneurial company formed when cellular telephony was first introduced, CommNet is well aware of the difficulties that smaller telecommunications businesses have faced and continue to face in raising capital in a wireless telecommunications marketplace that features rapidly expanding growth and competition. Although CommNet to date has successfully addressed such challenges, and has had significant success in increasing its financial resources through the public market, there is no assurance that this will continue to be the case -- particularly if virtually all other bidders except for CommNet and a handful of other small public companies are able to achieve the same result through the far simpler method of entering into strategic partnerships.

CommNet and other small publicly traded companies will be severely prejudiced if they are precluded from pursuing permissible joint ventures under the rules in the same manner as other applicants. In designing its 25 Percent Equity and 49.9 Percent equity structures, the Commission itself acknowledged that perhaps the best and easiest means for an entrepreneur or designated entity to obtain financing for a PCS venture is to

partner with other strategic investors, who under the rules can hold a meaningful portion of the PCS applicant's equity without triggering the entrepreneur's block financial caps.

Indeed, given the choice, rational investors desiring a "pure PCS play" simply will not invest directly in the existing capital structure of a publicly traded entrepreneur, which by definition is a pre-existing business and not a pure PCS play, if they can instead participate in PCS via a new venture with other applicants. At the same time, if such investors do come forward, the result of their investment will be to dilute the interests in CommNet and other publicly traded entrepreneurs held by the current shareholders of such entities. This business outcome is always available to publicly traded companies, but it would be a strange result indeed if the Commission's rules made this outcome inevitable.

Second, there simply is no sound policy reason for such disparate treatment of small, widely-held publicly traded companies. Were CommNet a private corporation (even one with much more significant assets and revenues than Commnet currently possesses) with identifiable controlling shareholders who could be designated as "qualifying investors,"<sup>15/</sup> it appears that there would be no problem with CommNet's designating itself as a "pre-existing entity," serving as the sole control group member of a PCS applicant, and then partnering with other entities so long as it retained 50.1% of the applicant's voting stock and 25% of the applicant's equity.<sup>16/</sup> Yet, simply because CommNet is a small publicly traded entrepreneur, and even though CommNet wishes to pursue precisely the same course, it

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<sup>15/</sup> See 47 C.F.R. § 24.709(b)(5)(1)(A)(B).

<sup>16/</sup> For "preexisting entities" the Commission's rules now provide that qualified investors in the control group need supply only 10% of the applicant's total equity. The remaining 15 % may be held by non-controlling existing investors in the control group, or individuals that are members of the applicant's management team. See 47 C.F.R. § 24.709(b)(5)(ii).

appears that CommNet may be precluded from invoking this model simply because it can identify no "qualifying investors" who exercise "de jure and de facto control of the applicant."<sup>17/</sup>

CommNet respectfully requests that the Commission remedy this skewed result. This could be easily accomplished in several ways, e.g., by expressly extending the public company exemption to the control group level, and/or by clarifying that companies like CommNet who meet the definition of "publicly traded corporation with widely dispersed voting power" may serve as a control group and take advantage of the 25 Percent Equity structure. There is a strong public interest in ensuring that all applicants who qualify as entrepreneurial companies under the Commission's rules are permitted to compete as effectively as possible for PCS licenses. In the current scenario, the Commission will needlessly stifle the public interest benefits that can be brought by an important class of bidders, and will do so by significantly reducing these bidders' ability to access entrepreneurial capital. Such a result is ironic to say the least, and undercuts the very basis for the creation of the entrepreneur's blocks.

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<sup>17/</sup> See 47 C.F.R. § 24.709(b)(5)(i)(A)(B).



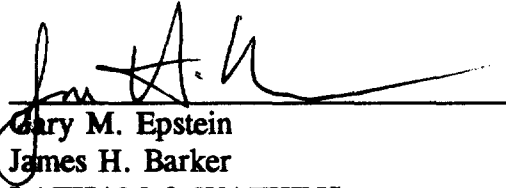
### III. CONCLUSION

For the foregoing reasons, CommNet respectfully requests that the Commission allow it and similarly situated companies to take advantage of the 25 Percent Equity structure, and to serve as a control group, in a manner similar to other entrepreneur's block auction participants.

Respectfully submitted,

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January 6, 1995